AT&T

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July 15, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

RE: Ex Parte
CC DKT. 97-137 Application by Ameritech Michigan for Authorization under Section 271 of the Communications Act to provide in region InterLATA Service in the State of Michigan.

Dear Mr. Caton:

The attached document was delivered today to Mr. A. Richard Metzger, Deputy Chief of the Common Carrier Bureau. The document outlines a proposed change to the Commission's procedures for the submission of comments and other information in connection with applications that the Bell Operating Companies file under Section 271 of the Telecommunications Act.

Two copies of this letter and the attachments are being submitted to the Secretary of the Federal Communications Commission in accordance with Section 1.1206(a)(1) of the Commission's Rules for inclusion in the record of the above-referenced proceeding.

Sincerely,

Betsy J. Brady

Attachments

cc: A. Richard Metzger

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July 15, 1997

Via Messenger
A. Richard Metzger
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W.
Washington D.C.

Re: Procedures For Applications Under § 271

Dear Mr. Metzger:

AT&T Corp. ("AT&T") respectfully submits this letter to request that the Common Carrier Bureau adopt one modification to its procedures for the submission of comments and other information in connection with applications that the Bell Operating Companies ("BOCs") hereafter file under § 271 of the Telecommunications Act of 1996: that the Bureau eliminate the page restrictions that apply to the ex parte comments that interested parties may file in response to the BOC's reply comments. AT&T makes this request because experience with the first two BOC applications has demonstrated that BOCs will otherwise use their reply comments to introduce reams of new data and arguments that could have been included in their initial applications and that interested parties will otherwise be precluded from effectively commenting on the new information and arguments.

To date, reply comments have been filed in connection with two § 271 applications: the SBC application for Oklahoma and the Ameritech application for Michigan. Both sets of reply comments included vast amounts of data, information, and arguments that were not contained in the original application and that the Department of Justice, the pertinent state commission, and private parties did not and could not address in their comments.

Some of this new material that was raised for the first time on reply consists of data (and studies concerning this data) that postdates the date of the BOC's application -- and

there is a clear remedy for this conduct. For example, Ameritech's Reply Comments extensively rely on data from an unbundled network element trial and OSS performance data that postdates not only the date of Ameritech's application (May 21) but also the date on which interested parties filed comments (June 10) and the date on which the Justice Department filed its evaluation (June 25). The Commission rules and precedents provide a clear remedy for these abuses, for the Commission has previously held that it will strike the portions of any BOC's reply comments that rely on data or events occurring after the application was filed.[1] AT&T has thus today filed a motion to strike all portions of Ameritech's Reply Comments that contain data or other information that postdate May 21, 1997, and AT&T is confident that this remedy will continue to be effective in preventing these forms of abuses of the § 271 processes.

By contrast, in their reply comments, BOCs have engaged in another kind of abuse that cannot always be controlled through motions to strike. In particular, both SBC and Ameritech have had information and arguments in their possession at the time they filed their application that the BOC knew to be highly material, but each made tactical decisions not to include the information in the original applications and instead raised them only in the reply comments to which interested parties have only limited rights to respond (i.e. by filing ex parte comments that cannot, in the aggregate, exceed 20 pages).

For example, one issue in SBC's application was whether it had sufficiently demonstrated that it is and would be in compliance with the separate subsidiary requirements of § 272 of the Act and the transactions that SBC's BOCs had previously conducted with SBC's § 272 affiliate were highly material to this issue. In the prior state proceedings, AT&T had asked SBC to disclose the data and other information relating to these transactions, so that it could be assessed and analyzed for compliance with § 272, but SBC refused to do so. And SBC did not disclose the information in the § 271 application that it filed with the Commission. However, in its reply comments, SBC did disclose new information, and argued that the transactions satisfied §272 in lengthy affidavits to which no party could effectively reply in 20 pages.[2]

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[1] Order, In the Matter of Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to provide In-Region, InterLATA Services in Michigan (CC Docket No. 97-1), FCC 97-40 at ¶ 21 (February 7, 1997).

[2] See Southwestern Bell's Reply to Comments on its Application for provision of in-region, interLATA Services in Oklahoma And Opposition to Petitions To Deny, CC Docket No. 97-121, pp. 28-29 & Reply Affidavits of Kathleen Larkin, Karol Sweitzer, and Elizabeth Ham (May 27, 1997).

And there are a multitude of similar examples in which SBC's and Ameritech's reply comments used data, information, and arguments that could have been relied upon in their applications, but that was not. For example, Ameritech's application had made no specific showing that its prices for unbundled network elements are cost-based, but merely offered conclusory assertions to this effect.[3] Ameritech's failure of proof was pointed out in AT&T's comments in opposition.[4] In its reply comments, Ameritech then proceeded, for the first time, to put in evidence relevant to the specific components of its network element rates.[5] If permitted to make further filings that exceed 20 pages, AT&T would demonstrate that the evidentiary showing in Ameritech's reply is equally insufficient.

Another example is Ameritech's treatment of number portability. Although AT&T has relied in all the prior state § 271 proceedings on Ameritech's refusal to provide the route indexing required for AT&T's Digitalink service, Ameritech's application said nothing about this issue, but merely conclusorily asserted that it had satisfied the checklist item for number portability.[6] AT&T's comments then refuted this showing, noting that Ameritech had stated that it was refusing to use the bona fida requests procedure for route indexing without regard to the technical feasibility of route indexing and in violation of § 251.[7] Ameritech's reply comments then addressed the matter for the first time and sought to rely on a Michigan PSC order that purportedly approved Ameritech's conduct.[8] If permitted to make further filings that exceed 20 pages, AT&T would point out that Ameritech's quotation from the Michigan PSC order is misleading and dishonest: through the use of an

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[3] Ameritech's Brief in Support of Application, CC Docket No. 97-137, pp. 35-40 & Affidavit of William C. Palmer, pp. 6-10 (May 21, 1997).

[4] Comments of AT&T Corp. in Opposition to Ameritech's Section 271 Application for Michigan, CC Docket No. 97-137, pp. 28-29 (June 10, 1997).

[5] See Ameritech's Reply Brief in Support of Application, CC Docket No. 97-137, pp. 13-14 & Reply Affidavit of Debra J. Aron, pp. 5-48; Reply Affidavit of Daniel P. Broadhurst, pp. 2-20; Reply Affidavit of William C. Palmer, pp. 3-20; Reply Affidavit of Paul F. Quick, pp. 3-21 (July 7, 1997).

[6] Ameritech's Brief in Support of Application, pp. 51-52 & Affidavit of Theodore A. Edwards, ¶¶ 154-61.

[7] Comments of AT&T Corp. in Opposition to Ameritech's Section 271 Application for Michigan & Affidavit of Judith D. Evans, pp. 22-31.

[8] Ameritech's Reply Brief in Support of Application & Reply Affidavit of Theodore A. Edwards, ¶ 90 n.21.

ellipses, Ameritech omitted the Michigan PSC's acknowledgment that Ameritech has represented it would consider route indexing or other technically feasible interim number portability methods in the BFR process.[9] The fact that there is no effective right to reply gives a BOC the ability to attempt to mislead the Commission in these ways.

AT&T cannot list each example of new arguments that were raised in SBC's and in Ameritech's replies in this letter, and there are many others beyond those discussed. But as this brief enumeration of new arguments makes clear, it would be impossible fully to correct the record through ex parte filings that could not collectively exceed 20 pages. In this regard, the Commission is fortunate that the first two applications that have been filed have been deficient on a multitude of other grounds, for the new material in the SBC application was not and could not have been of decisional significance. Because of the other defects in Ameritech's Michigan application, AT&T believes that the same will be true for it. However, unless the procedural rules are modified, there is unavoidably a risk that an application that does not satisfy the competitive checklist will be erroneously granted on the basis of information and arguments that were raised for the first time on reply and that interested parties were unable to refute.

This risk is a very real one. Today, the only remedy that exists for dealing with a BOC's sandbagging is the filing of a motion to strike. AT&T believes that such a motion could readily be granted to address the kinds tactics that SBC employed in the specific example discussed above. However, there are a range of situations in which the appropriateness of a motion to strike will be less clear and the Commission would be required to make more subjective judgments. For the instances in which a BOC's reply comments will rely for the first time on arguments that could have been raised in the initial application will range from situations where the BOC had undoubtedly made a conscious decision to "save" a specific argument for reply in order to prevent effective comments to situations in which the BOC may genuinely have decided that specific facts or arguments were germane only after it read the oppositions to the application. Similarly, there are degrees to which newly-introduced data and arguments will differ from those presented in the original application.

Because of the infinite array of circumstances in which BOCs will end up using preexisting data and arguments only in

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[9] "Ameritech proposes interim number portability be provided via Remote Call Forwarding (RCF), Direct Inward Dialing (DID) and NXX Migration. Ameritech also states that other methods of providing interim number portability, to the extent technically feasible, may be provided pursuant to the BFR process." AT&T/Ameritech Michigan Decision of Arbitration Panel, M.P.S.C. Case Nos. U-11151/11152, p. 47 (Oct. 28, 1996).

reply comments, it would be costly to private parties and potentially burdensome for the Commission if motions to strike were the only remedy. That is particularly so because a motion to strike ignore the problem that these reply comments create: that whatever the subjective reasonableness of the BOC's behavior, there is no effective opportunity for public comments on information and claims when they are withheld from the initial application and then raised for the first time in reply. And there are undoubtedly many instances in which the Commission would benefit from obtaining interested parties' comments on the new data and argument.

For these reasons, AT&T submits that the Bureau should modify its procedures so interested parties and the Commission have a remedy other than a motion to strike in these circumstances. While there may be instances in which the Commission may wish to explore other options for particular applications (e.g., allowing interested parties to file replies to the BOC's reply comments), AT&T believes that the most effective way to deal with this problem generically is for the Commission to eliminate the 20 page limit on ex parte filings, and this is the remedy that AT&T here proposes. Notably, interested parties realistically will go to the trouble of preparing detailed ex parte comments only in those instances in which the BOC's reply comments had genuinely used data that was available previously to raise new arguments that would be significant if they were not refuted. Thus, the principal effect of AT&T's proposal would be to cause BOCs to behave more responsibly and to cease using replies to make new arguments and claims that are false and could be refuted if parties had the opportunity to do so.

Respectfully submitted,

Mark C. Rosenblum/MB

Mark C. Rosenblum

cc: William B. Barfield
James D. Ellis
Saul Fisher
Charlie P. Russ
Kelly R. Welsh
James R. Young
All Parties Of Record To CC Docket No. 97-137